UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(San Jose and Mountain View, CA)

CYRUS, INC.

Employer

and

GOODYEAR TIRE & RUBBER COMPANY, INC.

and Case 32-RC-5390

TEAMSTERS AUTOMOTIVE
EMPLOYEES LOCAL UNION NO. 665

Petitioner

DECISION AND DIRECTION OF ELECTION

Goodyear Tire and Rubber Company, Inc., herein called the "User Employer" or "Goodyear", is a tire and rubber manufacturer headquartered in Akron, Ohio. Goodyear is engaged in the business of leasing tires to public transit operators or transit authorities. Cyrus, Inc., herein called the "Supplier Employer" or "Cyrus," is a professional consulting firm specializing in technical support services for industrial businesses, which includes the provision of temporary employees to these businesses. Teamsters Automotive Employees Local Union No. 665, herein called the Petitioner or the Union, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time commercial service technicians employed by alleged Joint Employers Goodyear and Cyrus at a multi-location bargaining unit comprising two sites in San Jose, California (the "7th Street Facility" and the "Zanker Road Facility") and at a third site

in Mountain View, California. A hearing officer of the Board held a hearing on October 19, 2005, and the parties filed briefs with me.[1]

At the hearing, the lone issue litigated by the parties was whether Goodyear and Cyrus constitute joint employers of the petitioned for employees (as asserted by the Union) or whether Cyrus is the sole employer of these employees (as argued by both Goodyear and Cyrus). However, in its post-hearing brief, Cyrus advanced, for the first time, the argument that the petitioned for unit is not presumptively appropriate given that it is neither a single-facility unit nor an employer-wide unit, and that the petitioned-for multi-location bargaining unit has not been shown to be appropriate. Since that issue was neither raised nor litigated at the October 19, 2005 hearing, and since the parties did not enter into a stipulation on this issue, I concluded that the record was insufficient for me to make a determination upon its merits. Accordingly, on November 9, 2005, I issued an "Order Reopening Record and Notice Of Representation Hearing" setting an additional hearing date for November 18, 2005. However, on November 17, 2005, Cyrus, Goodyear, and the Union each executed a "Stipulation" agreeing that the appropriate unit in this matter is:

> All full-time and regular part-time commercial service technicians employed at the Valley Transit Authority (VTA) facilities located at 7th Street, San Jose, Zanker Road, San Jose, and La Avenida Avenue, Santa Clara[2], California; excluding all managerial and administrative employees, all employees performing work at non-VTA facilities, all VTA employees, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

[1] Supplier Employer Cyrus appeared by video teleconference at the hearing, with the consent of all parties and the Hearing Officer.

[2] The La Avenida Avenue facility is actually located in Mountain View and not Santa Clara. This inadvertent error in no way constitutes a bar to my approval of this Stipulation.

As a result of the signing of this Stipulation, I concluded that the issue of the appropriateness of the multi-location bargaining unit was no longer in dispute. Therefore, on November 17, 2005 I issued an "Order Closing Record and Rescinding Notice Of Hearing" which cancelled the November 18, 2005 hearing and closed the record in this matter.[3]

Having resolved the appropriate unit issue, I now turn to the lone issue remaining in dispute – the joint employer issue. As evidenced in the hearing and in the parties' briefs, the parties disagree on the identity of the entity that employs the petitioned-for employees. Goodyear and Cyrus each contend that the tire changer employees are solely employed by Cyrus. Petitioner disputes this contention, and argues that Goodyear and Cyrus constitute joint employers of the employees, such that they are each properly named on the representation petition. For the reasons discussed below, I conclude that there is insufficient evidence to establish that Goodyear and Cyrus constitute joint employers of the petitioned-for employees. Accordingly, I shall direct an election in which Cyrus is the only named employer of the unit employees.

To provide a context for my discussion of the above-described issues, I will first provide an overview of the operations at issue herein. Then I will present in detail the facts of this case and the reasoning that supports each of my conclusions on the issues.

THE FACTS

1. Background

Valley Transportation Authority ("VTA") is a bus service in Santa Clara County that runs from Palo Alto, California to Gilroy, California. VTA has between 450 to 500 vehicles in its fleet. VTA is a governmental entity, with three locations, two in San Jose and one in Mountain

[3] I am hereby accepting this Stipulation into the record in this matter.

View. VTA has a contract with Goodyear pursuant to which Goodyear provides tires for VTA's vehicles, and VTA pays Goodyear by and per the amount of miles for which those tires are utilized. Goodyear leases the tires to VTA which then reports to Goodyear the amount of miles covered on a monthly basis. At any given time, Goodyear controls an inventory of approximately 4000-5000 tires valued at between $750,000 and $1,000,000 at the three VTA facilities. (Tr. 23-24; 107)

Cyrus is a corporation located in Glen Ellyn, Illinois that provides technical and industrial support staff for various client companies including Goodyear. Cyrus employs tire changers at Goodyear locations in California, Oklahoma, Ohio and Florida. Cyrus is owned by Eva Huerta Pavia. Paul Pavia, spouse of Eva Huerta Pavia, is not an employee of Cyrus, but has been utilized by Cyrus as its agent in communicating with its Spanish-speaking employees, including the six employees in the petitioned-for unit. (Tr. 141-44).

2. The Agreement And The Addendum

For a number of years prior to July 1, 2005, there were a total of six commercial service technicians ("tire changers") employed at the three VTA facilities. Three of these six tire changers were Goodyear employees. The other three were supplied by a different temporary agency - Unicco Service Company.[4] (Tr. 44-45). However, early in the year 2004, Goodyear made a systemic decision to phase out its tire changing operations and to focus instead on manufacturing tires and managing tire inventories. To carry out this decision, on January 30, 2004 Goodyear entered into an exclusive subcontracting agreement (hereinafter the Agreement) with Cyrus. (Tr. 136-38).

[4] Jose De Reza, Marciano Gutierrez, and Oswaldo Malanche were Goodyear employees. Jose Almarez, Marcelo Garcia, and Bernardo Malanche were supplied by Unicco. Although the record is not entirely clear (Tr. 71), it appears that one Goodyear employee and one Unicco employee worked at each of the three facilities, with one of the two working day shift and the other working night shift.

The Agreement consists of a 12 page master subcontract applicable to all facilities nationwide at which Cyrus performs services for Goodyear. (Employer Ex. 2). The Agreement provides that Goodyear must pay Cyrus a specified monthly amount, which is deemed to cover the costs of employee wages, benefits, insurance, taxes, overhead, training, uniforms, Cyrus's profits, and other items. In exchange for these payments, Cyrus must perform any or all of several enumerated tasks which include the mounting and dismounting of wheels and tires, the preparation of tire change records, the repairing and regrooving of tires, assistance with delivery and disposal of tires, and the inspection of tires and vehicles. The Agreement contains provisions which state that if unforeseen difficulties arise in the performance of such work, Cyrus "shall take every necessary and proper precaution to overcome the unforeseen difficulty according to the direction of Goodyear." (Employer Ex. 2, ¶ 12) The subcontract also requires that with respect to each tire furnished or serviced under Goodyear's contract with the ultimate customer, Cyrus maintain, store and submit to Goodyear forms including Tire Inventory Reports, Loss and Damage Tire Reports, New Tire Reports, Tire Inflation Reports, Tire Change Reports, and other reports that may be required. (Employer Ex. 2, ¶ 12).

There is a separate two page addendum to the Agreement (herein the Addendum) which is specifically applicable to the Goodyear contract with VTA at the three VTA locations at issue herein. Under the Addendum, there are some provisions granting Goodyear a limited amount of control over Cyrus' operations. Thus, the Addendum requires that Cyrus furnish Goodyear with six full-time tire changing employees and that, with ten days notice, Goodyear can require Cyrus to increase or decrease the number of employees it must supply. (Employer Ex. 2). The Agreement also allows Goodyear to require that Cyrus remove Cyrus personnel who endanger persons or property or whose continued employment under the subcontract is inconsistent with

the interests of Goodyear or VTA. Finally, the subcontract specifies that Cyrus must perform in accordance with Goodyear's standard service policy and VTA's contract specification requirements. (Employer Ex. 2, ¶¶ 12, 13).

However, other than these provisions that govern the general type and quality of the services that Cyrus must provide to Goodyear, the Agreement and the Addendum leave it up to Cyrus to determine the manner and means by which the work required under the subcontract is to be performed. In this regard, the Agreement specifies that the Cyrus personnel shall be operating under the "general supervision" of Cyrus, and the Agreement is notably void of any provisions granting Goodyear any control over the labor relations policies of Cyrus. Most importantly, the Agreement contains an "Independent Contractor" clause stating that, in performing these specified tasks, Cyrus "will be acting in an independent capacity and not as an agent, employee, partner, joint employer, or joint venture of … (Goodyear)." (Employer Ex. 2, ¶ 20).

3. The June 28, 2005 Meeting

On June 28, 2005, Goodyear and Cyrus held a meeting for the tire changers at the three VTA facilities. At this meeting, Goodyear announced that, as of July 1, 2005, it was going to subcontract out all of the labor on the Goodyear-VTA contract to Cyrus. On behalf of Cyrus, Pavia then informed the Spanish-speaking Cyrus employees of the new system and he offered them each employment with Cyrus. (Tr. 25-26; 205; 207). All six of the tire changers accepted Cyrus' job offer. Pavia then informed the six employees that he was going to be supervising them, and he provided each of them with a Nextel walkie-talkie with which to communicate with each other and with Cyrus personnel at its Chicago, Illinois headquarters regarding any questions they had about their work. (Tr. 29; 145; 200-201; 208). Subsequent to this June 28 meeting, Cyrus required each of the six employees to pass a pre-employment drug and alcohol history

examination. (Tr. 32; 165). Upon their passage of this test, Cyrus granted each of the six employees a wage increase and it gave them a copy of Cyrus' Employee Policies and Procedures Manual. (Tr. 146-147).

4. The Issue Of Robert Rossi's Supervisory Status

Petitioner's contention that Cyrus and Goodyear are joint employers is premised largely on the belief that Robert "Bob" Rossi, the Goodyear Account Supervisor, functions as the de facto supervisor of the tire changers. In this regard, Rossi has served as the Goodyear Account Supervisor for the three petitioned for sites for the past ten years. (Tr. 42). Since July 1, 2005, Rossi has been responsible for managing the inventory of tires, ensuring that Goodyear is satisfying its contract with VTA, and ensuring that Cyrus is satisfying its subcontract with Goodyear. (Tr. 22). It appears that Rossi is the only Goodyear employee at the three VTA locations. Rossi reports to Los Angeles-based Area Field Manager Ed Bowman and Vacaville-based Area Supervisor David Montecino. (Tr. 27). Rossi worked at these VTA sites both before and after Goodyear subcontracted out the work to Cyrus, and at all times has maintained an office at the 7th Street location. Rossi testified that his position remained essentially unaltered after the subcontract with Cyrus took effect. (Tr. 42).

In arguing that Rossi functions as the de facto supervisor of the tire changers, Petitioner does not dispute that, since July 1, 2005, Cyrus has been solely responsible for setting and adjusting the tire changers' terms and conditions of employment, including wages, holidays, health insurance, pension plans, vacations, work rules, work schedules, and vacations. Petitioner also does not dispute that Rossi lacks the authority to hire, fire, discipline, promote, demote, suspend, adjust grievances, lay off, or recall the tire changers. (Tr. 112-114). Rather,

Petitioner's contention that Rossi supervises the Cyrus employees is premised on the contention that Rossi has the authority to responsibly direct their work.

In this regard, the record reflects that Rossi works a swing shift that overlaps the shifts of the day shift and night shift tire changers, thus enabling him to interact with all Cyrus tire changers. Rossi visits each of the three pertinent VTA locations each morning as part of his normal duties. During these visits, Rossi inspects the work of the tire changer employees to ensure they are performing their work correctly. (Tr. 38, 77-78). In addition to inspecting the tire changer's work, Rossi also plays a role in verifying their time records. Thus, while the Cyrus employees prepare their own initial time sheets or time records (based on blank time sheet forms provided by Rossi), Rossi then compiles and assembles these time sheets, utilizing a computer program at Rossi's home, and then transmits such information weekly to Cyrus's corporate headquarters outside Chicago, Illinois.[5] (Tr. 52-53). Cyrus then prepares paychecks based on the information supplied by Rossi, it withholds all necessary taxes, insurance and other deductions from the paychecks, and it sends the completed paychecks back to him. Rossi then distributes the paychecks to the Cyrus employees. However, the record also reflects that Rossi is required to refer to Cyrus all questions involving the tire changers' scheduling, the availability and distribution of overtime, and complaints by VTA. (Tr. 37-38; 51-52).

Other than Rossi, Goodyear currently has none of its own solely employed employees at the three VTA facilities. There is no on site supervisor from Cyrus present at the facility.[6] It is

[5] Because Cyrus does not have a supervisor or manager on site at any of the three pertinent facilities, only Rossi has the ability to verify the hours actually worked by the Cyrus employees.

[6] There is no evidence in the record that any other suppliers or temporary agencies have any supervisors on site at the three pertinent facilities. In the period before July 1, 2005, when the supplied employees were provided by Unicco rather than Cyrus, there is no evidence that Unicco had any supervisors at the facilities. While Goodyear contends on brief that Rossi supervised only the Goodyear and not the Unicco employees prior to July 1, 2005, there is no evidence in the record which confirms or refutes this contention.

undisputed that Cyrus owner Eva Huerta-Pavia has not visited the VTA facilities at which the 6 tire changers are working at any time since Cyrus took over tire changing operations on July 1, 2005. Similarly, Pavia has visited the facilities only twice in the period shortly before and since Cyrus took over tire changing operations. (Tr. 26; 147; 182). However, it is also undisputed that both the tire changers and Rossi have been provided with Nextel walkie-talkies and instructed to use them to communicate with Pavia or Huerta at Cyrus's Illinois headquarters.[7] (Tr. 57).

In addition to these policies arising out of the language of the subcontract, there are also certain policies or practices to which Rossi ensures that the Cyrus employees adhere. For example, Rossi indicated that he views it as an unsafe practice to permit a single employee to stack tires alone, such that he routinely requires that there be at least two persons present stacking tires together. (Tr. 52). Rossi covers shifts for the would-be bargaining unit employees as necessary, and also possesses the authority to order Cyrus employees to work overtime, at least in situations where Goodyear faces fines or other possible penalties from VTA if a bus is not in operational condition. (Tr. 257). Finally, the record reflects that, on one occasion since July 1, 2005, Rossi granted a Cyrus employee permission in an emergency situation to take time off from work to attend his brother's funeral in Mexico. However, after allowing the Cyrus employee to leave, Rossi contacted Pavia by Nextel to advise him what had occurred and to receive his instructions. After speaking to Pavia, Rossi advised the remaining employees that they would need to work overtime to cover for the missing employee. Rossi then allowed the other employees to work out between themselves who would work the overtime. (Tr. 249; 251).

[7] The record reflects that unit employee De Reza has used his walkie-talkie on two occasions since July 1, 2005 to communicate with Pavia. However, the record is silent regarding how often Rossi and/or the other five unit employees use their walkie-talkies to communicate with Cyrus and regarding the contents of these communications.

Other than the above-detailed evidence, Rossi does not play any other role in directing the work of the Cyrus employees. Thus, the record reflects that it is the VTA foremen who prepare the work orders each day, and the foremen generally give the work orders directly to the Cyrus employees. (tr. 32-33). Moreover, since the six Cyrus employees have each worked at the VTA facilities since at least 1995, they know their job duties well and are able to perform their daily work tasks with little or no supervision. (Tr. 44). Similarly, when the six employees were first hired by Cyrus on July 1, 2005, they did not need any training because they already knew how to perform their jobs. Union witness De Reza also admitted that, since July 1, 2005, there has never been an occasion where he needed to ask anyone at Cyrus about tire changing, tire maintenance, or anything else about how to perform his job. (Tr. 178-79). Finally, when Cyrus first took over the operation, it allowed the six tire changers to select their own work hours and schedules, and these have not changed since Cyrus took over. (Tr. 84).

THE POSITIONS OF THE PARTIES

It is the position of both the User Employer Goodyear and the Supplier Employer Cyrus that Cyrus is the sole employer of the employees it supplies, and that Cyrus and Goodyear are not joint employers of the Cyrus-supplied employees. Petitioner takes the opposite position, and argues that Goodyear and Cyrus are joint employers. As set forth below, I find, in agreement with Goodyear and Cyrus, that there is insufficient evidence to establish that Goodyear and Cyrus are joint employers.

ANALYSIS

To establish that two employers are joint employers, the entities must share or codetermine matters governing essential terms and conditions of employment. NLRB v. Browning-Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982); Riverdale Nursing Home, 317

NLRB 881, 882 (1995). In particular, the employers must meaningfully affect matters relating to hiring, firing, discipline, supervision and direction. Riverdale Nursing Home, 317 NLRB at 882; TLI, Inc., 271 NLRB 798 (1984). The Board determines joint employer status based upon the totality of circumstances; shared control of employees' labor relations is sufficient to show that a joint employer relationship exists. Cabot Corp. 223 NLRB 1388 (1976); Sun-Maid Growers, 239 NLRB 346, 350-351 (1978). Criteria used to determine joint employer status include control over means and methods of doing work,[8] including provision of equipment; control over assignment, direction and supervision of work;[9] absence of supervision by a nominal supervisor;[10] direct or indirect control over hiring, firing and discipline;[11] and control over wages, overtime, or other compensation/benefits.[12]

The Board's recent cases make clear that a key to joint employer status is whether the putative joint employer's control over employment matters is direct and immediate. See Airborne Express, 338 NLRB 597, n. 1 (2002). The Board has correspondingly distanced itself from earlier cases that premised joint employer status on a putative joint employer's contractual authority to control some employment conditions even if that authority was not exercised. See Jewel Tea Co., 162 NLRB 508 (1966); Airborne, supra, at 598, n. 3. See also Syufy Enterprises, 220 NLRB at 740 (actual exercise of control over matters governing terms and conditions of

---

[8] The Painting Company, 330 NLRB 1000, 1006-1007 (2000).

[9] Capitol EMI Music, Inc., 311 NLRB 997, 998 (1993).

[10] Sun Maid Growers, 239 NLRB at 351.

[11] Heileman Brewing Co., 290 NLRB at 1000.

[12] D & F Industries, 339 NLRB at 640 (joint employer where user determined the number of available vacancies to be filled by the supplier, established the rates of pay and provided the funds from which they were paid, and decided when overtime was required and the number of employees necessary for such work); Quantum Resources Corp., 305 NLRB at 760-761 (joint employer where user authorized overtime, signed weekly timesheets, codetermined hours, holidays and benefits, and was involved in determining job duties, wage levels and number of employees at site).

employment, notwithstanding any contrary intention set forth in the parties' commercial contract, can be a sufficient indication of a joint employer relationship).[13]

In the present case, it is undisputed that it is Cyrus, and not Goodyear, that determines the tire changers' wages and benefits. Moreover, at the hearing, Goodyear adduced conclusory but unchallenged testimony from Rossi that he lacks the power to hire, fire, discipline, evaluate, promote, demote, suspend, lay off, recall, or adjust grievances of the tire changers, and that he lacks the power to effectively recommend any of these things.[14] With respect to the power to hire, the record indicates that the pertinent tire changers were originally hired by Goodyear or Unicco in the pre-Cyrus period. However, it is undisputed that in June of 2005, after Goodyear awarded the subcontract to Cyrus, it was Pavia on behalf of Cryrus that offered the six tire changers continued employment. While it appears that Goodyear viewed the performance of these six employees in a sufficiently favorable light that it did not oppose their continuing employment by Cyrus after July 1, 2005, there is nothing in the record to suggest that Goodyear conditioned its agreement to the Cyrus subcontract upon Cyrus hiring the six tire changers who were already employed at the facility. Finally, while the subcontract between Goodyear and Cyrus required Cyrus to conduct pre-employment drug, alcohol and/or background screening of

---

[13] Villa Maria Nursing and Rehabilitation Center, Inc., 335 NLRB No. 99 (2001) further illustrates that actual practice and not bare subcontract terms are given more weight by the Board. In that case, there was a written agreement between the employer and its housekeeping subcontractor that permitted the employer to ask for the removal of any subcontractor personnel not acceptable to the employer; that required the subcontractor to discipline its employees who acted in a manner unacceptable to the employer; and that established a joint review committee made up of representatives of the employer and the subcontractor to engage in a quarterly review of the subcontractor's performance. Despite this clear contract language, the Board found that none of these factors, individually or cumulatively, proved that the employer oversaw the daily work of, or exercised indirect but effective control over, the subcontractor's employees.

[14] Although the Petitioner's brief notes an instance in the record in which Rossi was questioned as to how he would handle a situation where he had a problem with a Cyrus employee, and in which Rossi indicated he would report the matter to Paul Pavia at Cyrus (Tr. 37), I do not rely upon this brief colloquy as evidence of Rossi's power to effectively recommend discipline given the absence of any specific illustrations of this alleged power, as well as the absence of even any speculative additional evidence as to how Rossi might handle such a situation.

the six employees, I cannot find that this relatively routine subcontract hiring prerequisite suffices in and of itself to confer the power to hire upon Goodyear or to otherwise qualify Goodyear as a joint employer herein. See, Villa Maria, supra; Southern California Gas, infra.

Turning to the power to fire or discipline, there is no evidence in the record that any of the six current tire changers have ever been fired or even disciplined, whether by Goodyear, Unicco, or Cyrus, at any time during the pre-Cyrus or post-Cyrus period. While, as noted, Goodyear has the power to request that Cyrus remove personnel from the premises of Goodyear or Goodyear's customer, there is no evidence in the record that Goodyear has ever exercised this power or even made such a request.[15] Rossi further testified that he lacked power to hire or fire, both before and after the arrival of Cyrus.[16] In these circumstances, I cannot find that Goodyear meaningfully codetermines the firing and/or discipline of Cyrus employees. See Airborne, supra, at 597 n. 1.

Having concluded that Goodyear lacks the authority to hire, fire, or discipline the Cyrus employees, or to determine their wages and benefits, I find that the joint employer issue turns upon whether Goodyear/Rossi has the power to assign work to and/or responsibly direct, the Cyrus employees. On this point, the Petitioner asserts and Goodyear correspondingly denies that Rossi has sufficient authority to responsibly direct their work to constitute a statutory supervisor of the Cyrus employees.[17]

---

[15] The Board has also found that the power to remove a supplied employee from the user employee's premises power fits readily within an employer's prerogatives to prevent disruption of its own operations and see that it is obtaining the services it contracted for. Such prerogatives do not in and of themselves mandate a finding of joint employer status. Southern California Gas Co., 302 NLRB 456, 461 (1991).

[16] While Eva Huerta-Pavia similarly testified that she has never disciplined any Cyrus employee, she did not testify, as did Rossi, that she lacked the authority to do so if the occasion arose.

[17] To the extent that the Petitioner formally took a position on the record that Rossi constitutes a statutory supervisor (Tr. 254), despite advancing the more general argument on brief that "Goodyear" rather than Rossi supervises the Cyrus employees, the Petitioner as the party having asserted Rossi's supervisory status bears the

For its part, Goodyear asserts that any direction that Rossi provides to the Cyrus employees is limited and routine. In so arguing, Goodyear cites TLI, Inc., 271 NLRB 798 (1984), which itself relied heavily upon Laerco Transportation, 269 NLRB 324 (1984). In both cases, the Board did not find that a joint employer relationship had been established, despite the presence of many of the same factors as in the instant case. In TLI, the lease agreement provided that the user employer Crown would be solely and exclusively responsible for maintaining operational control, direction and supervision of the drivers TLI supplied to Crown. In the instant case, while the subcontract requires Cyrus to comply with Goodyear's standard service policy and VTA's contract specification requirements, the subcontract also makes clear that Cyrus personnel operate under the general supervision of Cyrus. In TLI, the logs and records prepared by the TLI employees were kept by Crown yet submitted to TLI for payroll purposes, just as the Cyrus employee time records are prepared by the Cyrus employees, submitted to Rossi at Goodyear, and then sent by Rossi to Cyrus headquarters in Illinois. TLI employees reported mechanical or other problems with their vehicles to Crown rather than TLI, just as the Cyrus employees deal with Rossi (and even with VTA foremen or drivers) rather than Cyrus in the event that the Cyrus employees discover defects in the tires and/or require guidance as to how to perform their jobs. Finally, the TLI-supplied drivers worked only for Crown and no other clients, just as the Cyrus tire changers work only for Goodyear and no other clients. However, in spite of all of these factors, the Board in TLI declined to find joint employer status, relying expressly upon the absence of hiring, firing and disciplinary authority on the part of the user employer Crown, in conjunction with the limited and routine day-to-day supervision provided by it. I find that TLI strongly supports Goodyear's position in the present case.

---

burden of proving it under the Act. NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861 (2001).

Laerco is equally supportive of Goodyear's position. In Laerco, user employer Laerco supplied the vehicles used by the employees of supplier employer CTL, just as Goodyear provides tools and equipment to the Cyrus employees here. Laerco determined the qualifications of the CTL drivers it would accept, just as Goodyear reserves a comparable right in its subcontract with Cyrus. There were no CTL supervisors on site at the Laerco facility, just as there are no Cyrus supervisors on site at the Goodyear facility. As in the present case, there was evidence in Laerco that the employees had recurring and routine functions such that little supervision or oversight was necessary. The employees in Laerco knew what to do upon receiving invoices from Laerco or its client, just as the employees in the present case know what to do upon receiving a work order from Rossi or directly from VTA. While Laerco is distinguishable in certain respects,[18] I find that overall Laerco supports Goodyear's denial of joint employer status in this case.

On the other hand, there is some case authority that supports Petitioners' joint employer contention. Thus, in contrast to Laerco's downplaying of the absence of day-to-day supervision by the supplier employer, there are cases in which the Board has stressed the absence of the ostensible employer from the workplace in finding joint employer status. See D & S Leasing, Inc., 299 NLRB 658, 671 (1990) (joint employer relationship found where principals of supplier employer had little contact with their employees other than sending them paychecks); Computer Associates International, Inc., 332 NLRB 1166, slip op. at 6 (2000) (user employer Computer Associates a joint employer of building engineers supplied by supplier employer Cushman and

[18] In Laerco, there was additional evidence that user employer Laerco sought to resolve employee dissatisfactions as an accommodation to supplier employer CTL but referred disciplines and grievances to CTL for resolution. Importantly, there was also evidence in Laerco that supplier employer CTL had collective bargaining agreements with the petitioning union at other locations in that case. I note that in Quantum Resources Corporation, 305 NLRB 759, 761 (1991), in the course of finding a joint employer relationship to exist, the Board distinguished Laerco partially on the basis of the existence of the previous collective bargaining agreement in that case.

Wakefield where Computer Associates supervisor exercised supervision of Cushman and Wakefield engineers for long periods in the absence of any Cushman and Wakefield statutory supervisor).[19] Similarly, in *Lodgian, Inc. d/b/a Holiday Inn City Center*, 332 NLRB 1246 (2000), a case cited by Petitioner in its brief, the Board found joint employer status between a hotel and a company that supplied personnel to the hotel based, in part, on the fact that the supplier company did not have any supervisory presence at the hotel and did not direct the day to day work of the employees.

Petitioner relies upon these and similar cases in asserting that Rossi must be found to be a statutory supervisor of the Cyrus employees.[20] However, I find these cases distinguishable and conclude that, to establish Rossi's supervisory status, Petitioner must do something more than merely point out that, if he is not, then their closest supervisor is 2000 miles away in Illinois. As the Supreme Court made clear in Kentucky River, supra, the party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status.[21] To meet this burden Petitioner must provide sufficient detailed evidence of the circumstances surrounding alleged supervisor Rossi's decision making process in order to demonstrate that he was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status.

---

[19] However, in Computer Associates the Board appeared to rely more heavily upon the factors of user employer's role in the hiring process and the user employer's ongoing close and substantial supervision of the supplier employer's employees than upon the physical absence of a supplier employer supervisor. 332 NLRB No. 108, n. 2.

[20] Petitioner also relies heavily upon De Reza's testimony that he checks in each morning with Rossi and that he considers Rossi to be his boss. However, the record reflects that "checking in" consists largely of saying hello and letting Rossi know that De Reza is there. Therefore, De Reza's testimony is not dispositive of this issue. Nevertheless, in discounting the importance of De Reza's testimony, I do not accept Goodyear's invitation to make credibility resolutions as between tire changer employee Jose De Reza and Goodyear Account Supervisor Bob Rossi, and I also do not express any view or make any finding as to Goodyear's assertion that De Reza was improperly coached by Petitioner or its counsel.

[21] NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861 (2001). See also, Bennett Industries, Inc., 313 NLRB 1363 (1994); Tucson Gas and Electric Co., 241 NLRB 181 (1979).

In analyzing the issue of Rossi's supervisory status, the starting point is the undisputed conclusion that Rossi does not possesses any authority to hire, suspend, lay off, recall, promote, discharge, discipline, or adjust the grievances of, employees. Moreover, the evidence that Rossi assigns or responsibly directs work is relatively limited. While he passes on to the Cyrus employees work orders prepared by the VTA foremen or drivers, there is also evidence that in Rossi's absence the VTA foremen and drivers submit work orders to the Cyrus tire changers without the involvement of Rossi. There is no evidence in the record that Rossi is called upon to determine the relative skill levels of the Cyrus tire changers and to assign work on the basis of such determinations. The assignment of tasks in accordance with an employer's set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. Express Messenger Systems, 301 NLRB 651, 654 (1991); Bay Area-Los Angeles Express, 275 NLRB 1063, 1075 (1985). The Board and federal courts typically consider assignment based on assessment of a worker's skills to require independent judgment and therefore to be supervisory, except where the "matching of skills to requirements [is] essentially routine." Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001). In this case, it does not appear that Rossi exercises independent judgment when he gives the sole tire changer working at one of the three VTA facilities during a given shift a tire removal or repair assignment. I find that the handling of such routine situations generally does not require the exercise of judgment and discretion, and is akin to the assignment of routine tasks.

In determining whether direction is responsible, the focus is also on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs. Children's Farm Home, 324 NLRB 61 (1997); KDFW-TV, Inc., 274

NLRB 1014 (1985). In this regard, I note that apart from testimony about Rossi's duty to monitor Goodyear's compliance with its contract with VTA and Cyrus's compliance with its subcontract with Goodyear, there is little evidence in the record that Goodyear upper level supervisors Ed Bowman and David Montecino will contact Rossi or hold Rossi responsible in any manner in the event that any of the Cyrus-supplied employees fail to accomplish any particular tasks. There is also no evidence in the record that Rossi has ever received any disciplinary warnings on the basis of any alleged failure to direct and delegate work to the Cyrus-supplied employees.

The record does reflects that Rossi, on behalf of Goodyear, has some power to assign overtime to Cyrus employees, along with the related authority to temporarily interchange employees. (Tr. 257).[22] In this regard, De Reza testified that on at least one occasion since the July 1, 2005 takeover, Rossi asked De Reza to move from his usual 7th Street location to the Zanker Road location in order to cover a portion of the shift normally worked by vacationing Zanker Road employee Jose Almarez. (Tr. 179, 213-215). Rossi also testified that it is "my policy" to spread overtime work out as equitably as possible. (Tr. 251). While Rossi testified at other points that the actual scheduling of overtime was either a collaborative effort between Goodyear and Cyrus (Tr. 37, 52, 75-76, 99, 249) or that he permitted Cyrus employees to decide amongst themselves which of them wanted overtime opportunities (Tr. 251-252), the record reflects that Rossi on behalf of Goodyear retained the power to require mandatory overtime, and to address unanticipated staffing shortages by requiring overtime. For example, there is evidence in the record that when an unnamed employee had to miss a week of work in order to go to Mexico to attend to the burial or other funeral services of a family member, Rossi immediately

[22] The record reflects that Rossi possessed the power to assign mandatory overtime to Goodyear employees in the time before Cyrus as well. Tr. 253-254.

and unqualifiedly released that employee from work to attend to his family situation, without having consulted with Pavia or other Cyrus personnel and with a probable suspicion but not a certainty that his decision would result in the need to have one or more remaining Cyrus employees work overtime hours in the absence of that employee. (Tr. 249, 251). Similarly, Rossi testified that in situations where VTA's busses are not in satisfactory condition to be legally on the road, it is easier and more effective for Rossi to perform unit work himself or require overtime of the Cyrus employees than it would be for Rossi to contact Cyrus headquarters in Illinois and have Cyrus provide tire changing employees from some other state. (Tr. 256-257). Thus, an argument can be made that Rossi's powers with respect to the authorization and requiring of overtime on the part of Cyrus employees support the conclusion that Goodyear constitutes a joint employer of the Cyrus employees in this case. See Quantum Resources Corp., 305 NLRB 759, 760-761 (1991); Computer Associates International, Inc., 332 NLRB 1166, slip op. at 7 (2000). However, given that Rossi appears to confer with Pavia or another Cyrus representative in the course of determining who will be assigned the overtime and how much overtime will be assigned, and given that on most occasions the Cyrus employees decide for themselves how overtime will be distributed, I cannot find that Rossi exercises the requisite independent judgment in the course of overall overtime decisions.

Finally, I note that, while a conclusion that Rossi is not a statutory supervisor would mean that the nearest supervisor of the six unit employees is 2000 miles away in Illinois, in the unique circumstances of this case such a finding is not anomalous. Thus, the work performed by the tire changers is essentially repetitive and routine; the tire changers are all long term employees who are familiar with the work and can perform it with little or no daily supervision; Pavia is always available by Nextel walkie-talkie if any problems arise; the VTA foremen are

responsible for preparing the daily work orders for the Cyrus employees; and the unit is a relatively small one with only six employees spread evenly over three separate facilities.[23] Moreover, I note that it is undisputed that at many of the other locations where Cyrus acts as a subcontractor to Goodyear, there is no Goodyear presence whatsoever. Under these circumstances, the absence of a statutory supervisor at any of the three VTA facilities is not so unusual as to compel a finding that Rossi must be a statutory supervisor.[24]

Accordingly, on the basis of the foregoing, I cannot conclude that the present record supports the contention that Account Supervisor Rossi exercises the type or amount of independent judgment in the course of assigning or responsibly directing work that is necessary to qualify him as a statutory supervisor in this matter. Based on that finding and the controlling authority in TLI and Laerco, as well as on the absence of any other evidence that Goodyear shares or codetermines matters governing essential terms and conditions of employment, I must conclude that Petitioner has not demonstrated that Goodyear constitutes a joint employer of the Cyrus-supplied employees in this case.

I therefore find that the following employees of Cyrus constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time commercial service technicians employed by Cyrus, Inc. at the Valley Transit Authority (VTA) facilities located at 7th Street,

[23] I note that no party has taken the position that the VTA is a joint employer with Cyrus. Even assuming, but without finding, that the VTA supervisors assign and direct the work of the Cyrus employees, I would not find the VTA to be joint employer with Cyrus, because the VTA is a government entity and is not an employer as defined in the Act.

[24] In this regard, the instant case is clearly distinguishable from Lodgian, supra, a case heavily relied upon by Petitioner. In Lodgian, the Board's joint employer finding was premised on evidence that the user employer "assigns, directs, and oversees the work" of the supplier employer's employees. In the instant case, the evidence of Goodyear's authority over the work of the Cyrus employees is much more circumscribed.

and at Zanker Road in San Jose, California and at La Avenida Avenue in Mountain View, California; excluding all managerial and administrative employees, all employees performing work at non-VTA facilities, all VTA employees, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

CONCLUSIONS

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer Goodyear Tire & Rubber Company, Inc., is an Ohio corporation with headquarters in Akron, Ohio and a facility and office located in San Jose, California, where it is engaged in the manufacture, retail sale, repair and installation of tires. During the past 12 months, Goodyear derived gross revenues in excess of $500,000, and purchased and received goods valued in excess of $50,000 directly from businesses located outside the State of California. In such circumstances, I find the assertion of jurisdiction over Goodyear appropriate herein.

3. I find that during the past twelve months Cyrus performed services valued in excess of $50,000 to Goodyear, an enterprise which itself meets one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. In such circumstances I find the assertion of jurisdiction over Cyrus appropriate herein.

4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

5. Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time commercial service technicians employed by Cyrus, Inc. at the Valley Transit Authority (VTA) facilities located at 7th Street, and Zanker Road in San Jose, California and on La Avenida Avenue in Mountain View, California; excluding all managerial and administrative employees, all employees performing work at non-VTA facilities, all VTA employees, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

There are approximately 6 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by TEAMSTERS AUTMOTIVE EMPLOYEES LOCAL UNION NO. 665. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **November 30, 2005.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (510) 637-3315. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **December 7, 2005.** The

request may **not** be filed by facsimile. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance electronic filing can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

.

Dated: November 23, 2005

Alan B. Reichard, Regional Director,
National Labor Relations Board
Region 32
1301 CLAY STREET, SUITE 300N
Oakland, CA 94612-5211

32-1310

177-1650
177-2414-2200
440-1740-5000
440-1760-9167-0200
440-1760-9167-0233 (if appropriate)
440-1760-9167-0267 (if inappropriate)
440-5033-6020
530-5714